

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Sandwich Isles Communications, Inc.)	
)	
Petition for Waiver of the Definition of)	CC Docket No. 96-45
“Study Area” Contained in Part 36,)	
Appendix-Glossary and Sections 36.611,)	
and 69.2(hh) of the Commission’s)	
Rules)	

OPPOSITION TO APPLICATION FOR REVIEW

Sandwich Isles Communications Inc.

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June 30, 2005

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SUMMARY

Beginning at least in 1992, the Hawaiian legislature, Hawaii Public Utilities Commission (“HPUC”), and the Department of Hawaiian Home Lands (“DHHL”) struggled with the refusal of the dominant carrier, GTE, to provide adequate service to rural areas, including the Hawaiian Home Lands (“HHL”), except where customers made aid to construction contribution at unaffordable levels. DHHL, as trustee for the HHL, recognized that this effort was not likely to be successful and designated Sandwich Isles Communications, Inc. as its licensee to serve the 203,500 acre area.

Sandwich Isles began service in 1997. In reliance on a 1998 Common Carrier Bureau waiver, Sandwich Isles has invested over \$166 million to bring telecommunications service to the HHL. Sandwich Isles filed a new waiver petition in accordance with the 2004 Commission decision reversing the Common Carrier Bureau. GTE’s successor, once removed, Hawaiian Telcom Communications, Inc. (“HTC”), now seeks Commission review of the 2005 Wireline Competition Bureau order granting the new waiver.

Neither HTC nor its predecessor, Verizon, opposed the waiver before the Bureau; if they had, Sandwich Isles’ Reply Comments would have been different. Further, HTC for the first time, asserts a vague claim that the Bureau should somehow have considered compensation to it for establishing Sandwich Isles’ study area, even though the Sandwich Isles study area designated by the Bureau includes no facilities or customers purchased by HTC from GTE’s direct successor, Verizon. HTC asserts because it was in the

process of acquiring Verizon's Hawaii study area, it was unable to fully investigate the facts, but the basic relevant facts were fully set out in the Commission's 2004 order, and sophisticated purchasers cannot be heard to claim ignorance of the implications of Sandwich Isles waiver Petition, which requested a larger area than the Bureau granted.

The Bureau applied the Commission's standard test for study area waiver Petitions and correctly found that grant of Sandwich Isles' Petition would have less than a 1% impact on the universal service fund ("USF") in the year of application, that the state authorities did not object, and that the public interest would be served. HTC asserts the Bureau ignored evidence in the record which led to different conclusions as to the first and third elements.

Regarding the USF impact, HTC claims the Bureau should have considered later years where Sandwich Isles' growth in lines might have caused its USF to exceed 1% of the total, all other things remaining equal. However, the test has always been to measure impact in the year of application. Given the existing clear policy, it would have been error for the Bureau to rule otherwise, unless and until the Commission changes that policy on a prospective basis. In any event, all things will not remain equal. The base USF numbers, and perhaps the underlying algorithms will change, and Sandwich Isles' cost per line will decrease as the lines it has constructed to match the DHHL development schedule are placed in service.

HTC challenges the Bureau's Public Interest finding by making the factually erroneous claim that the Bureau should have considered its evidence that GTE/Verizon/HTC were all ready willing and able to serve the HHL. The Bureau

examined HTC's factual claims, but correctly found (1) that the test is not whether some other party could provide the service better, and (2) that in any event, GTE was not providing service to the area it designated as Sandwich Isles' study area. GTE, Verizon, and HTC, in turn, have agreed to serve low density rural areas, which comprise about 99% of the HHL, only if the subscriber or DHHL would agree to make capital contributions in aid to construction at such a high and unaffordable level as to constitute a constructive refusal to provide service.

HTC also alleges support for Sandwich Isles is excessive, because it presently has constructed more lines than it has subscribers. But Sandwich Isles is not building into vacant land. It timely constructs facilities as DHHL opens new housing areas. Constructing prior to completion of a development is standard industry practice, which ultimately results in considerable cost savings. DHHL has a waiting list of over 20,000 people, who are moving into the developments as they are constructed.

The Bureau did not, as HTC claims, ignore evidence to support HTC's unfounded allegation that Sandwich Isles is using universal service support for purposes for which it was not intended. The Bureau considered and rejected both HTC's claims (1) that Sandwich Isles has constructed facilities with the capability to offer other services than the "supported services," and (2) that press reports of statements by Sandwich Isles' officials of future intention for a competitive subsidiary of its parent establish misuse of support funds. As to the former, the Bureau noted the Commission's *Rural Task Force Order* explicitly contemplates that facilities constructed to provide supported services may also provide advanced service. For the latter, the Bureau simply found that press

reports about possible future action, entirely legal in themselves, were not evidence of misuse.

HTC's requests that the Commission establish boundaries between the two carriers and clarify its rights on the HHL. The Bureau's functional definition excludes from Sandwich Isles' study area the part of the HHL served by GTE in 1997. The Commission routinely assumes that the carriers involved can work out the fine details of boundaries. Sandwich Isles holds itself out to work with HTC in good faith to delineate operating boundaries. The theoretical potential for disagreement is no reason to grant review of the Bureau's Order. As to HTC's federal status in the HHL beyond the 1997 areas, the Bureau properly deferred to another proceeding which is considering the status of ILECs in areas that were once their study areas. The Bureau also recognized but correctly rejected HTC's argument that it should have proceeded under Section 251(h)(2).

HTC's assertion that the Bureau Order will result in a flood of similar cases seeking USF support ignores the unique status of the land and the trusteeship obligations of state officials, which are not duplicated anywhere else in the country. HTC suggests no mechanism or set of facts by which these circumstances are likely to be duplicated.

Finally, the Bureau did not exceed its delegated authority, rather its decision carefully followed Commission precedent in the study area waiver proceedings, including the most recent *Skyline* and *CETC* orders.

For the foregoing reasons, the Application for Review should be dismissed.

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OPPOSITION TO APPLICATION FOR REVIEW AND MOTION TO DISMISS

Sandwich Isles Communications, Inc. (“Sandwich Isles”), by its attorney, pursuant to section 1.115(d) of the Commission’s Rules files its Opposition to the Application for Review of Hawaiian Telcom Communications, Inc. (“HTC”) filed June 15, 2005. Sandwich Isles will show below that the Application for Review is without merit and should be dismissed.

I. INTRODUCTION

A. Summary Of Facts

Beginning at least by 1992, the Hawaiian legislature, Hawaii Public Utilities Commission (“HPUC”), and the Department of Hawaiian Home Lands (“DHHL”) struggled with the refusal of the dominant carrier, GTE, to provide adequate service in rural areas, including the Hawaiian Home Lands (“HHL”). GTE constructively refused to serve by demanding aid to construction contributions so substantial that they made

rural service unaffordable. DHHL as trustee for the HHL, recognized this effort was not likely to be successful and designated Sandwich Isles Communications, Inc. as its licensee to serve the HHL on the six major islands.

In 1996, Sandwich Isles, through its parent, was assigned a license to provide telecommunications service throughout the 203,500 acres set aside by Congress in 1921 for the benefit of native Hawaiians. DHHL as trustee for the HHL had grown frustrated with the refusal of GTE, then the incumbent local exchange carrier, to commit to extend service into the rural areas, which comprise 99% of the HHL, except upon receipt of very substantial capital contribution payments to support facilities construction. Sandwich Isles, however, proposed to construct telecommunications facilities using loan funds obtained from the U.S. Department of Agriculture's Rural Utilities Service ("RUS").

Sandwich Isles began operations on the HHL in 1997. Shortly thereafter, the then Common Carrier Bureau, over the objections of GTE, granted waivers which, in effect, allowed Sandwich Isles to function as an incumbent local exchange carrier ("ILEC") for access charge and universal service purposes. In reliance on those waivers, Sandwich Isles has invested over \$166 million to extend service to HHL locations on all of the major islands in the State.

In October 2004 the Commission reversed the Bureau's 1998 decision. On December 27, 2004 Sandwich Isles filed its Petition for waiver of the freeze on study area boundaries pursuant to the October Order. Many parties, including the Hawaiian congressional delegation, filed supporting comments and neither HTC nor its

predecessor, Verizon, opposed the waiver. The waiver was granted by the (now) Wireline Competition Bureau on May 16, 2005.

HTC, the successor once removed to GTE¹, now asks the Commission to again reverse the Bureau, asserting various errors of omission or commission, and challenging its authority to act under delegated authority. Alternatively, HTC asks the Commission to clarify its status with regard to existing and future customers. Sandwich Isles demonstrates below that the Bureau's Order is well supported by the record, consistent with Commission policy and precedent, and that there is no need for additional clarification by the Commission.

B. HTC Neither Objected To Grant Of The Waiver Nor Claimed Entitlement To Compensation, It Therefore Should Not Now Have Standing To Object To The Waiver Or Claim Compensation.

HTC claims standing to seek review on the basis that it is “aggrieved” because the Bureau's Order allegedly “stripped” HTC's study area of 203,500 acres without any “consideration of compensation ...for investment it has made there.” HTC should not be accorded standing to seek review of the Order, because it did not, in its comments, object to Sandwich Isles' waiver request nor did it assert any right to compensation.²

¹ Verizon “flipped” GTE Hawaiian Telephone Company to the venture capital entity which now owns HTC after only 7 years. However long that firm plans to retain ownership is unknown to Sandwich Isles. Sandwich Isles, however, a Hawaiian owned company, is dedicated to providing service to the Hawaiian Home Lands rather than investing for future sale.

² If HTC had responded to Sandwich Isles' Petition with an Opposition instead of just raising issues to consider, Sandwich Isles' Reply Comments would have been written significantly differently. *See, Sprint v. Federal Communications Commission*, 315 F.3d 369, 377 (D.C. Cir. 2003).

HTC claims it was “constrained” in filing comments because its acquisition from Verizon was then pending and it was not “in a position to fully acquaint itself with the facts surrounding the petition.”³ While there are undoubtedly often some surprises in major purchases no matter how “due” the diligence, HTC cannot claim ignorance of the very basic fact that grant of the waiver would mean that Sandwich Isles’ study area would not be part of the study area HTC was purchasing. The extensive comments filed by HTC, as well as the fact that its principals and counsel are highly sophisticated in telecommunications issues, demonstrate that it had in fact researched Sandwich Isles operations and fully understood the implications of Sandwich Isles’ Petition. Moreover, nothing in the Bureau Order changed the *status quo*.

Assuming, *arguendo*, that a study area designation could create a compensation issue,⁴ and further assuming that such issue had been raised during the comment cycle, which it was not, HTC identifies no facts on the record or in its Application for Review that would create a predicate for a compensation claim. In addition, because the Bureau had no opportunity to decide such a claim, there is nothing for the Commission to review.

In any event, because neither GTE nor Verizon expanded service into the HHL after 1997, the Bureau’s decision to exclude from Sandwich Isles’ study area those portions of the HHL which were receiving service from GTE in 1997 means that neither HTC nor its predecessors in interest have ever made any investments in the Sandwich Isles study area. All of the GTE/Verizon facilities and customers on the HHL are left in

³ HTC Application at 3-4.

⁴ As explained in section III A, below, study area designation is an accounting rule. The authority to provide local exchange service comes from state commissions.

HTC's study area and are not affected by the Bureau Order. Because the Bureau excluded the areas on the HHL where GTE had facilities and service in 1997 from Sandwich Isle's study area, any question of HTC's continuing right to maintain service in that area is a question to be resolved between DHHL and HTC and is not relevant to any issue currently before the Commission.⁵

II THE BUREAU ORDER'S FINDINGS ARE WELL SUPPORTED BY THE RECORD AND CONSISTENT WITH ESTABLISHED PRECEDENT

A. The Bureau Followed The Well Established Test For Evaluation Of Study Area Waiver Petitions.

Sandwich Isles' Petition addressed each of the three elements required to be established for grant of a waiver of the study area freeze: (1) that there will be no adverse impact on the universal service fund; (2) that the state regulatory authorities do not object; and (3) that public interest will be served.⁶ Specifically, Sandwich Isles first demonstrated, without contradiction, that the shift in high cost support resulting from grant of the waiver will be less than one percent of the total annual high cost support in the year of application. Second, Sandwich Isles presented documentation from both the HPUC and the DHHL that those agencies did not object to grant of the waiver. Third, Sandwich Isles documented the benefits it provides to its customers and that those benefits were not available through any other party. The Bureau accepted these showings.

⁵ HTC's status on the HHL and the boundaries between its study area and Sandwich Isles' are discussed further in section III C, below.

⁶ *U S West Communications and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix Glossary of the Commission's Rules*, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1774 (1995).

HTC challenges the Bureau's conclusions on elements (1) and (3) alleging that it ignored purported relevant evidence to the contrary. As to point (1), HTC asserts the Bureau should have considered USF impacts in future years and should have considered the impact of additional support paid to a wireless carrier to which Sandwich Isles' support is "portable."⁷ HTC, which elsewhere chides the Bureau for allegedly improperly applying precedent,⁸ in effect suggests the Bureau should not have followed well established precedent and procedures. The Commission's *October Order* provided no basis for the Bureau to deviate from established guidelines. To the contrary, it stated explicitly: "Any such waiver request will be evaluated under the criteria set forth in the *PTI/Eagle Order*."⁹ The Bureau properly followed this direction. It would have been error for it to do otherwise.

The Bureau's Order is also consistent with the Commission's most recent study area waiver decision, *Skyline*, which also involved a discrete area where no service was available, although the area had been included in other carriers' study areas.¹⁰ There the Commission readily found that the public interest is served by creating a new study area

⁷ HTC asserts that Sandwich Isles high cost support will exceed 1% of total support by 2009, based on computations which grow Sandwich Isles lines but hold all other factors constant (HTC Application at 11 and note 40), but all else will not be constant. Other carriers costs will change, the support algorithms may well change, and Sandwich Isles unit cost will decrease as additional subscribers are added that are served from the existing infrastructure. It may also be the case that support for competitive ETCs is calculated based on their own costs.

⁸ HTC Application at 3.

⁹ *GTE Hawaiian Telephone Company, Inc. Application for Review of a Decision by the Common Carrier Bureau*, Memorandum Opinion and Order, 19 FCC Rcd 22268, note 33 (2004) ("*October Order*").

¹⁰ *M&L Enterprises, Inc. d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612 and 69.2(hh) of the Commission's Rules*, Order, 19 FCC Rcd 6761 (2004) ("*Skyline*").

for a carrier that would respond to demands for service which had long gone unmet. Contrary to HTC's claim, the Commission's recent decision regarding designation of Eligible Telecommunications Carriers does not purport to revise the standard for study area waivers.¹¹

As to the public interest factor, element (3), HTC asserts the Bureau's finding "overlooks substantial evidence" that grant of the waiver would not serve the public interest.¹² Specifically HTC claims the Bureau failed to investigate both the costs and benefits of granting the waiver, that Verizon, HTC's immediate predecessor, was supposedly ready, willing and able to serve the HHL for less than Sandwich Isles and that "special" circumstances weigh against granting the waiver. Each of HTC's arguments are unfounded, because the Bureau's examination of the USF impact necessarily involved an investigation of the costs as well as the benefits.

The Bureau gave due consideration to HTC's contention that other parties were capable of serving the HHL, but relied upon evidence from citizens that when GTE, Verizon's predecessor, was the only service provider, they had endured "years of neglect with no or less than adequate service."¹³ The record before the Bureau, including statements by the Hawaiian Homes Commission, also demonstrated that GTE's demands for aid to construction contribution made service unaffordable.¹⁴ Also before the Bureau was the record of the unsuccessful efforts of the Hawaiian legislature and the HPUC to

¹¹ *Federal-State Board on Universal Service*, Report and Order, Mar. 17, 2005, FCC 05-46, para. 55. The Commission stated only that states may consider the level of USF support as a reason for limiting the number of ETCs in a study area.

¹² HTC Application at 6.

¹³ Bureau Order at paras 21-22, n. 74.

¹⁴ *Id.* and note 76.

spur GTE to actually serve rural areas, which comprise about 99% of the HHL, or to encourage alternative providers.¹⁵

The Bureau's finding that there is "ample evidence" in support of the public interest in grant of the waiver is thus well documented by the record.¹⁶ While the Bureau correctly stated the proper test is whether grant of the application will serve the public interest, not whether another party may theoretically provide a greater benefit, the record convincingly shows there was no other party "ready willing and able" to serve.¹⁷ It was for this precise reason that DHHL granted a license to Sandwich Isles' parent to provide service to the area for which it is the trustee.¹⁸

Unlike the typical study area waiver petition where the public interest determination must be made upon the credibility of future intents, because of the unique procedural status of the case, the Commission is able to evaluate the ability of Sandwich Isles to fulfill its commitments. The Bureau Order quotes from nine of the 18 local parties with direct knowledge of the service Sandwich Isles has provided since 1997 and which support the findings that service was unavailable as a practical matter and that Sandwich Isles has provided major public interest benefits by providing affordable local telephone service to areas where customers had not previously been able to obtain service. Also in the record before the Bureau was a letter from the entire Hawaii congressional delegation stating that the waiver was important to the "continued

¹⁵ See, Sandwich Isles Petition at 2-5.

¹⁶ Bureau Order at paragraph 24, notes 74 and 76..

¹⁷ Sandwich Isles' Petition at 3.

¹⁸ RUS requires that its loan applicants submit and comply with an "area coverage" design and does not permit the imposition of aid to construction charges.

deployment of critical infrastructure necessary to provide modern, reliable communications services to the residents of the HHL....”¹⁹

- B. HTC’s Claims That It Is Prepared To Provide Service To All Of The HHL Are Not Credible Because It Would Continue The GTE/Verizon Policy Of Requiring Unaffordable Aid To Construction Capital Contributions From Prospective Subscribers.

HTC asserts the Bureau erroneously found that GTE was not offering service throughout much of the HHL, and that HTC is and has always been ready willing and able to provide service to the HHL.²⁰ These statements are simply not correct. HTC relies on the Commission’s statements in the *October Order* that GTE served the “proposed areas” to support its claim, but it has both the facts and the legal analysis wrong. The 1997-1998 proceeding focused on the areas of Oahu where Sandwich Isles’ first initiated service and which GTE claimed were not unserved, because its existing central offices could serve the areas. The point of the *October Order* as well as *Skyline* was only that in such circumstances a study area waiver is required. The *October Order* did not amount to a factual finding that GTE was actually providing service to the HHL areas except for a few urban or suburban locations.

There is no dispute on the record, and HTC offers no new evidence, that the portion of the HHL actually served by GTE in 1997 comprised less than 1% of the HHL

¹⁹ Letter to Michael K. Powell, Chairman from Senators Daniel K. Inouye and Daniel K. Akaka and Congressmen Neil Abercrombie and Ed Case, February 7, 2005.

²⁰ HTC Application at 7, 9.

area.²¹ HTC makes much of the supposed obligation of GTE to serve the entire HHL, but whatever the obligation of GTE to serve may have been, it successfully avoided having to actually invest capital to provide service by the simple expedient of refusing to provide single party service, at least initially, and demanding aid to construction payments which made service economically impossible for either DHHL or its trust beneficiaries.²²

HTC defends aid to construction charges as proper because the requirement was in the applicable tariff. Whether a tariff required such charges is irrelevant to the question of whether the charges made it impossible for citizens to order service. HTC's defense of aid to construction is not restricted to GTE's practices in the mid 1990s, but are stated in the present tense under its own name: "Hawaiian Telcom must rely on the customer requesting service to provide payment for facilities (or DHHL if it is the entity requesting service)." ²³ This stark admission leads to the unavoidable conclusion that if the Bureau's order is reversed, residents of the HHL will be thrown back to where they were before Sandwich Isles initiated service: with unaffordable aid to construction

²¹ Sandwich Isles' Petition at pp. 2-5 described at length the efforts of various portions of the Hawaii government to remedy the lack of service in rural areas generally and the HHL in particular.

²² HTC claims at page 8 that the Crozier affidavit proves GTE offered service to the DHHL. The affidavit says no such thing, but proves instead that GTE refused to provide single party service to the area in question. The affidavit describes a meeting limited to service at Maku'u and as to that service: "I was informed that the only phone service available was party lines and that DHHL would have to bear the costs of upgrading GTE's facilities in order to obtain single party service." Affidavit of Michael Crozier, Sep. 3, 1997, attached to Sandwich Isles Communications, Inc., Reply to Late-Filed Comments and Opposition, , AAD 97-82, Oct. 2, 1997.

²³ HTC Application at 12. A recent local news report on the Bureau Order prompted a non-HHL resident, from whom GTE and later Verizon had demanded an unaffordable aid to construction contribution, to request Sandwich Isles' service. Sandwich Isles response is provided at Appendix A.

demands.²⁴ In other words, it is evident that HTC's supposed commitment to serve the HHL is contingent upon the potential subscribers providing the capital, which most will be unable to do. Such a result would essentially frustrate the efforts of DHHL to ensure that modern, affordable telecommunications services are available to its trust beneficiaries as the HHL are developed.

B. HTC Cannot Simultaneously Complain That Sandwich Isles Has Constructed Facilities On The HHL Before Developments Have Been Occupied, And That Sandwich Isles Has Not Served The HHL Because It Has Not Yet Built Facilities Throughout The HHL

Despite its claim that GTE was willing to serve all the HHL, HTC admits "GTE/Verizon could not afford to build facilities to vacant properties," and criticizes Sandwich Isles for building facilities to uninhabited developments.²⁵ As HTC knows full well, it is standard and rational industry practice to construct utilities, particularly buried utilities in developments before they are occupied or roads and lawns completed. The cost of having facilities in place with no revenue is offset by avoiding the much greater cost and customer inconvenience of installing facilities after other construction is complete and buildings occupied. Sandwich Isles works closely with DHHL so as to ensure that communications facilities are constructed at the appropriate phase in the development process. DHHL's waiting list of over 20,000 persons exceeds the facilities to serve approximately 4,000 lots which have been constructed so far.

Of course, Sandwich Isles has not constructed facilities where DHHL has not yet scheduled development. Its commitment to construct at the appropriate time is not only

²⁴ HTC Application at 12.

²⁵ HTC Application at 10. HTC quickly shifted from "not-yet-occupied" to vacant, apparently to imply such construction is imprudent.

demonstrated by its substantial progress starting from nothing only eight years ago, but also by its contractual obligations contained both in its license from DHHL and its mortgage with RUS. Both entities require Sandwich Isles to provide “area coverage” without aid to construction charges.

HTC contends that the Bureau erred by finding “GTE was not offering service throughout much of the Hawaiian home lands” because that finding conflicts with the Commission’s *October Order* conclusion that “an area is not ‘unserved’ as a matter of law if it is within the study area of another carrier.”²⁶ The Bureau’s Order does not turn on a finding that the HHL were “unserved” within the meaning of the Commission’s study area waiver rules and policies, but only recognizes that except for the small areas, constituting less than 1% of the HHL, which it excluded from Sandwich Isles’ study area, there was no service available. The fact that the tariffs of GTE, Verizon and now HTC may have offered service throughout is not proof of HTC’s claim that it “provides service to the HHL as a matter of fact.”²⁷

C. The Bureau Correctly Found No Evidence That SIC Used Support For Purposes For Which It Was Not Intended

HTC repeats its unfounded claims that SIC is using universal service support for purposes for which it was not intended and alleges the Bureau “completely ignores” its evidence.²⁸ The “evidence” upon which HTC relies to accuse Sandwich Isles of filing false certifications and duping state officials was not ignored by the Bureau but

²⁶ HTC Application at 7.

²⁷ Id., Especially since HTC’s tariff apparently follows its predecessors in aid to construction requirements.

²⁸ HTC Application at 12.

considered and properly rejected. The Bureau rejected HTC's claim that constructing an advanced fiber optic network capable of providing advanced services was improper, and found to the contrary that it was consistent with the statute and the Commission's *Rural Task Force Order*.²⁹ The Bureau's conclusion that there is no evidence in the record that Sandwich Isles is using universal service support for improper purposes is fully supported by the record. The newspaper articles cited by HTC, even if they constituted "evidence," do not demonstrate that Sandwich Isles is misusing universal service support.

HTC alleges Sandwich Isles is improperly using support at present, but cites only allegations as to how its facilities may be used in the future. HTC relies on sources such as newspaper and magazine articles, regarding the plans of an affiliate, to challenge Sandwich Isles' truthful and documented statement that it is authorized to provide service only to the HHL.³⁰ HTC knows full well that in the ordinary course of business, regulated carriers may have separate corporate affiliates that are unregulated or differently regulated.

Since its inception, and including the present, Sandwich Isles has not provided facilities or services to any other entity, including affiliates, nor provided service outside of the HHL.³¹ If and when any other entity, including an affiliate, uses Sandwich Isles facilities to provide communication service, that use will be properly allocated pursuant

²⁹ Bureau Order at para. 24.

³⁰ HTC Application at 6, citing Forbes Magazine. Sandwich Isles' Reply Comments noted that this article also states, "Hawaii's main carrier (formerly GTE, now Verizon) never built out its networks to serve the Home Lands.) Reply at 10.

³¹ Sandwich Isles correctly stated it has no authority to operate outside the HHL. See, HPUC Order No. 16078, Doc. 96-0026, Nov. 14, 1997. Whether a subsidiary of Sandwich Isles' parent may be considering service in other parts of the state does not make Sandwich Isles statement "disingenuous or misleading," as claimed by HTC at p. 6.

to the Commission's rules. Sandwich Isles pointed out in its Reply Comments that it is subject to audit by the Commission, the HPUC, DHHL, RUS, NECA and USAC and that no concerns have been expressed as to improper use of support.³²

As the Commission is aware, most ILECs today offer a variety of services including supported services over their facilities by themselves or to other service providers. The fact that Sandwich Isles might follow similar practices in the future is no justification for the slanderous allegation that it has falsely certified to the Commission that it has properly used the support it has received.

III OTHER ISSUES RAISED BY HTC DO NOT WARRANT COMMISSION REVIEW

A. Further Commission Action To Establish Boundaries Or Rights Of HTC In The HHL Is Unnecessary

HTC complains that "one of the most basic flaws with the Order" is that the Bureau failed to establish precise boundaries between the respective study areas of HTC and Sandwich Isles.³³ With regard to the precise boundaries, HTC's comments did raise a question as to whether or not the proceeding concerned the entire HHL, but did not request precise boundaries be established.³⁴ Such a request would have been unusual, since the numerous study area waivers that have been granted by the Commission over the last 20 years generally do not provide specific geographical boundaries, but leave that issue to be worked out by the parties.

³² Sandwich Isles' Reply Comments, Feb. 22, 2005, p. 8.

³³ HTC Application at 14.

³⁴ HTC (as Hawaiian Telcom Mergersub, Inc.) Comments, Feb. 8, 2005, 4-5.

Here there is no showing that this is a real issue that requires Commission intervention. The Bureau Order quite precisely defined Sandwich Isle's study area as "only those areas where there were no facilities or service on the Hawaiian home lands in 1997, *i.e.*, the areas that Sandwich Isles claimed were unserved in its 1997 Petition."³⁵ The areas unserved by GTE in 1997 consisted of the entire HHL, less those areas where GTE had facilities and customers.

Presumably, the records HTC received from Verizon provide precise details as to the location of the facilities it purchased and the names and addresses of its subscribers. Sandwich Isles is perfectly willing to cooperate with HTC to develop maps delineating their respective study areas. Absent a showing of any real dispute, there is no reason for the Commission to involve itself in such details.³⁶

Nor is there any reason to review the Bureau's Order to resolve the question raised by HTC as to whether it is entitled to continue to provide service in the HHL and whether "anyone is the ILEC" in Sandwich Isles' study area.³⁷ The Communications Act does not require that there be an ILEC everywhere. Where necessary or appropriate, the

³⁵ Bureau Order at para. 15.

³⁶ HTC asserts, at 5, that grant of the waiver somehow puts it at a competitive disadvantage because some parts of the HHL which Sandwich Isles intends to serve are in urban areas, such as near the University of Hawaii. The fact that Sandwich Isles is a rural telephone company does not preclude it from serving its authorized areas within the HHL, whether urban or rural. Particular study area boundary and state authority questions should be addressed first by the parties in the state with detailed knowledge of the facts. Such questions are no basis for reversal of the Bureau Order.

³⁷ HTC Application at 15.

Commission may, by rule or waiver, determine that certain carriers should be treated as ILECs for specific purposes.³⁸

HTC's comments did discuss the question of the effect of Sandwich Isles' exclusive license from DHHL. The Bureau, however, properly determined that "any challenge to a so-called exclusive license is better addressed in the context of a section 253 proceeding."³⁹ HTC is, of course, free to institute such a proceeding, under the standards of that section.⁴⁰

HTC asks whether it has authority to serve the HHL as an ILEC or CLEC. The Bureau Order notes that the Commission is considering in another proceeding issues relative to this question.⁴¹ Because HTC has not applied to the Hawaiian authorities for authority to operate as a CLEC on the HHL, there is no reason for the Commission to address a hypothetical question. In any event study area waivers do not purport to establish or rescind authority to serve, which in the case of local exchange carriers is generally determined by state authorities. A study area is an accounting concept that determines how investments, revenues and expenses are recorded and reported, they assume the LEC has authority to serve.

The Bureau order specifically contemplates that HTC will continue to provide service to its existing customers on the HHL, and there is no precedent or suggestion that HTC has any federal obligation to provide service outside of its own study area. As the Commission has previously recognized, if a carrier's study area and operations areas did

³⁸ See, 47 U.S.C. 251(h).

³⁹ Bureau Order at para. 23.

⁴⁰ Sandwich Isles would expect to oppose any petition which sought federal preemption of its DHHL license.

⁴¹ Bureau Order at para. 15.

not match, there would also be an undesirable mismatch of investment, expenses and revenues.⁴²

B. The Bureau Properly Found The Application Of Section 251(h)(2) Beyond The Scope Of Sandwich Isles' Petition.

HTC argues that the Bureau should have classified Sandwich Isles as an ILEC pursuant to Section 251(h)(2).⁴³ The Bureau recognized that that issue might have arisen if it had defined Sandwich Isles' study area to include "areas actually served by another carrier," but correctly found that given its resolution of the boundary question, and the substantial differences in the applicable legal standard and analysis, there was no need to address the question.⁴⁴ HTC, or any other party, remains free to initiate a Section 251(h)(2) proceeding at any time, but its comments cannot be considered as such a request because, *inter alia* they did not address the three elements of that Section.

C. Sandwich Isles Service To The Hawaiian Home Lands Is A Unique Situation Which Cannot Be Duplicated Elsewhere

HTC asserts the Bureau's Order creates a precedent that will precipitate a land rush on the universal service fund by new carriers. Sandwich Isles explained in its Petition that because of the unique status of the land which it serves and the successor trustee role of a state agency, the circumstances are incapable of being duplicated anywhere in the country.⁴⁵ HTC does not suggest either a factual pattern or a mechanism

⁴² See, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board [foregoing in ital.], Notice of Proposed Rulemaking, CC Doc. No. 80-286, 5 FCC Rcd 5974, 5976 (1990).

⁴³ HTC Application at 15.

⁴⁴ Bureau Order at paras. 15, note 89.

⁴⁵ Sandwich Isles Petition at 22.

by which the unique circumstances of both the Hawaiian Homes Lands and the procedural path of this proceeding are likely to be duplicated.

D. The Bureau's Order Is Fully Within Its Delegated Authority.

HTC claims the Bureau exceeded its delegation of authority by deciding “novel questions of law and policy.”⁴⁶ The delegation however does not prevent the Bureau from acting on novel questions, only those “which cannot be resolved under outstanding precedents and guidelines.”⁴⁷ Sandwich Isles recognizes that there are some unique aspects to the facts presented and it is for this reason that it believes the Bureau Order does not establish new precedent which would cause a flood of new demand on the universal service fund. The Bureau addressed the facts before it by carefully applying the extensive precedents and guidelines from the many study area waivers which have been resolved over the past 20 years or so.

HTC asserts four special circumstances that it claims are inconsistent with grant of the waiver.⁴⁸ These four factors have never been enunciated by the Commission as public interest factors that should be taken into account in evaluating a study area waiver. Notwithstanding, even if the Commission were to consider these factors, they do not support reversal of the study area waiver grant.

⁴⁶ HTC Application at 3,6.

⁴⁷ 47 C.F.R. 0.291(a)(2).

⁴⁸ HTC Application at 20.

First, HTC points to the fact that there was no sale underlying the waiver petition, but does not explain why that fact precludes grant of the waiver.⁴⁹ The Commission's recent *Skyline* decision, in fact also involved grant of a waiver when there was no sale. Second, HTC claims "the ILEC opposes the waiver." HTC may oppose the waiver now that it has been granted, but it had its opportunity to oppose Sandwich Isles Petition and explicitly did not do so. Verizon, HTC's predecessor at the time comments were filed, did not oppose grant of the waiver. It is thus precluded from claiming to now oppose the Petition.

Third, HTC alleges that the per line and total support amounts are large. Sandwich Isles has addressed that issue above and pointed out that the per line amounts are high at this time due to the fact that it is in the build-out mode where its entire service area is essentially new development, and that the per line costs will come down as the developments are occupied.⁵⁰ Finally, HTC complains about the exclusive license from the HHL trustee, but does not explain how that is relevant to whether Sandwich Isles should be treated as an ILEC for purposes of access charges and universal service support. As mentioned above, the Bureau properly found that any challenge to the exclusivity should be brought in a separate proceeding.

IV. CONCLUSION

HTC's Application for Review has failed to establish that the Bureau's action under delegated authority conflicts with statute, regulation, precedent or established

⁴⁹ Because the study area defined by the Bureau involved neither assets nor customers of HTC or its predecessors, there was nothing for HTC to sell. This was also the case in *Skyline*.

⁵⁰ See, Sandwich Isles Reply Comments at 18.

policy. To the contrary, the Bureau carefully followed precedent and properly rejected HTC's arguments that it should create new policies. HTC has not established that any questions of law or policy not previously resolved by the Commission were raised by Sandwich Isles' Petition. To the contrary, the Commission's *October Order* was clear that the Commission had considered the law and policy issues and expected the petition to be considered under existing policies. For the same reason, HTC's pleas that the Commission should overturn or revise its policies can and should be rejected. Nor did the Bureau make any erroneous findings of material facts. The Bureau properly rejected HTC's "spin" on various press reports which it claimed supported its contention of improper use of funds, because those reports were not evidence of improper use.

The Petition should be dismissed.

Respectfully submitted

Sandwich Isles Communications, Inc.

By /s/ David Cosson
 Its Attorney

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June 30, 2005

APPENDIX A



Sandwich Isles Communications, Inc.

A Waimana Company

June 27, 2005

Ms. Lori Enriquez
P.O. Box 1518
Pahoa, HI 96778

Dear Ms. Enriquez:

Thank you for your inquiry last week and for sharing your situation of not having access, for the past 20 years, to telephone services to your residence and the 40 other residences of your community. Sandwich Isles Communications, Inc. (SIC) is only authorized to provide service on lands administered by the Department of Hawaiian Home Lands, and therefore cannot assist you with your current and on-going dilemma. As discussed, however, the authorized telephone company responsible for providing service to you and your community is Hawaiian Telcom, formerly Verizon Hawaii, Inc.

As a follow-up to your inquiry and request for agency contact information, you may want to contact Hawaiian Telcom, directly, as the new service provider for your area to share your situation and request assistance. An appropriate contact person should be:

Ms. Ann Nishida
Senior Staff Consultant, External Affairs
Hawaiian Telcom
1177 Bishop Street, Honolulu, HI 96813
Ph: 546-1888

In requesting assistance, you may want to share the \$87,000 cost you would have had to pay for dial tone quoted to you 10 years ago by GTE Hawaiian Tel. In addition, you might share the average monthly cost of \$250 you indicated to me that you are currently paying for cellular phone service to stay connected.

Awareness of your situation by your newly authorized service provider is extremely important and a necessary step toward finding appropriate solutions to your current and on-going situation. Again, thank you for your inquiry, and if we can be of further assistance, please feel free to call me at 540-5737. Mahalo!

Aloha,

Gil Tam

VP, Administration & Community Affairs

cc: Ms. Ann Nishida, Sr. Staff Consultant, HTI
Mr. Alan Oshima, SVP & General Counsel, HTI

CERTIFICATION OF SERVICE

I, David Cosson, certify that a copy of the foregoing Opposition to Application for Review of Sandwich Isles Communications, Inc. in the CC Docket No. 96-45 was served on each of the following on June 30, 2005:

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